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MAR - 8 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF:

MM DOCKET NO. 93-94

SCRIPPS HOWARD BROADCASTING COMPANY
and
FOUR JACKS BROADCASTING, INC.

Baltimore, Maryland

DATE OF CONFERENCE: February 24, 1994

VOLUME: 14

PLACE OF CONFERENCE: Washington, D.C.

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FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
Balt. & Annap. (410) 974-0947

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SCRIPPS HOWARD BROADCASTING COMPANY)
and)
FOUR JACKS BROADCASTING, INC.)

MM DOCKET NO. 93-94

Baltimore, Maryland)

The above-entitled matter come on for conference pursuant to Notice before Judge Richard L. Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom 4, on Thursday, February 24, 1994 at 9:30 a.m.

APPEARANCES:

On behalf of Scripps Howard Broadcasting Company

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On behalf of the Chief, Mass Media Bureau:

ROBERT A. ZAUNER, Esquire
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Washington, D.C. 20554

I N D E X

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25	Conference Began: 9:30 a.m. Conference Ended: 9:50 a.m.

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P R O C E E D I N G S

1
2 JUDGE SIPPEL: I called this conference on, on short
3 notice because I was concerned about what was represented in a
4 footnote on a notification that was filed yesterday by Four
5 Jacks and exact notification ties in with work that I'm
6 assuming is going on at your law firm, Mr. Leader, and I want
7 to be sure that you understand the nature of what my rulings
8 have been up to this point.

9 MR. LEADER: I'm not sure I understood what you just
10 said, Your Honor.

11 JUDGE SIPPEL: Well, are you -- there was a
12 notification that was filed yesterday. You filed a
13 notification. It's a Pleading of Style notification of Four
14 Jacks Broadcasting, Inc. and it -- what it does is it puts me
15 on notice that you intend to file a Motion for Summary
16 Decision on the 28th of February and there is a footnote in
17 there that makes reference to an earlier ruling of myself
18 where I had, I had indicated some, some disfavor with respect
19 to resolving that issue by summary decision.

20 MR. LEADER: A predisposition on your part.

21 JUDGE SIPPEL: Well, that's the, that's the point.
22 I don't think it's a predisposition and I wanted to clear that
23 up.

24 MR. LEADER: Well, it certainly -- first of all, as
25 I read the rule that you cited, the rule was put in by the

1 Commission to prevent parties from filing Motions for Summary
2 Decision days or weeks before a hearing was, was to commence
3 with the idea of delaying the hearing pending resolution of
4 the Motion for Summary Decision, so I didn't think when I read
5 that -- your footnote that it was apt because the proceeding
6 has been delayed until July by -- on your own motion. Neither
7 Mr. Howard nor Mr. Greenbaum or I had anything to do with
8 that, so the filing of our motion is not calculated to be
9 abusive. It's not calculated to delay the proceeding. It
10 just seems to me that if you're willing to hear a very --
11 you've indicated predisposition to rule on a very complex
12 issue which you added against Scripps Howard. You ought to,
13 in fairness, give us the same opportunity to present our, our
14 case in writing, especially since, Your Honor, I think in
15 adding the issue there was a -- that there is a mistake of
16 fact, that you, you cited something that is -- you say is in
17 the S-1 which is not in the S-1, and I'd like to be able -- I
18 think this -- I think our issue can be settled by summary
19 decision. The Bureau opposed the addition of the issue
20 against us. The Bureau at an earlier time suggested to Ms.
21 Schmeltzer and me that we file a Motion for Summary Decision
22 to resolve this issue. So, you know, I'd like to -- I don't
23 see any reason why we can't. We're not going to be in hearing
24 until July. We're not delaying anything. You've got
25 approximately five-and-a-half months to rule on this. And I

1 just think fairness -- you know, that we ought to receive the
2 same treatment as Scripps Howard and fairness dictates that
3 result.

4 JUDGE SIPPEL: Well, I think that these -- as I -- I
5 see them as being different issues. I mean, they're -- the
6 nature of the issue that was added with respect to Four Jacks
7 is different. It's a different -- it's a -- not only is it a
8 different set of facts, but it addresses the direct merits of
9 your integration proposal. What I'm concerned about with
10 respect to Scripps Howard has to do with discovery. Basically
11 it's a discovery issue.

12 MR. LEADER: Well, I think the Scripps Howard, with
13 all due respect, Your Honor, is far more serious and it goes
14 beyond just a discovery issue. It goes to the very heart of
15 their renewal expectancy case and what they have to prove.
16 And what I don't want to see happen in this proceeding is that
17 it be unnecessarily delayed because you rule on a Motion for
18 Summary Decision. Later it's reversed and we're back in
19 hearing to determine just what Scripps Howard did when it, it
20 had received certain discovery requests, why some information
21 was turned over, why some information was found, etc. I think
22 that those -- I don't see how those issues, with all due
23 respect, can be resolved on the basis of written pleadings.
24 I'm not here to argue that. We'll -- we're going to save that
25 for our written presentation. But I just think fairness

1 dictates that we be given the same opportunity to present our
2 case in writing that Scripps Howard is, and maybe, maybe both
3 can be resolved and we don't need a July hearing.

4 JUDGE SIPPEL: Well, I still want to come back to
5 what -- the concern that I -- first of all, with respect to
6 this rule for Summary Decision, the, the provision that I have
7 relied upon, all right, in terms of what I feel is
8 discretionary on my part in terms of how I want to handle
9 evidence in this case has to do with subparagraph (f) and it
10 says in there that the -- 1.251 subparagraph (f) -- that I may
11 rule in advance of a motion that the proceeding is not
12 appropriate for summary decision. That's all. I think that
13 gives me the discretion to decide whether or not I want to
14 hear an issue, decide an issue up front by summary decision,
15 and it -- as I -- in my assessment of the issues yours is
16 different than the one that was added against Scripps Howard.
17 It's just a -- it's -- by virtue of its very nature it's just
18 a different evidentiary concerns that I have.

19 MR. LEADER: I don't dispute that they're different
20 issues, they're different facts. You know, I think --

21 JUDGE SIPPEL: And that's why.

22 MR. LEADER: I think different -- pardon me?

23 JUDGE SIPPEL: I say that's why these questions have
24 to be handled sui generis. Each is different. The fact that
25 -- but I would, I would think you'd want to bring in the

1 people and find out what they did and why there was all the
2 testimony about the notes were illegible and might be
3 meaningless and they would destroy -- they might destroy --

4 MR. LEADER: Our main objection to the argument of
5 the, the decision that's already been made in this proceeding
6 to pursue a Motion for --

7 JUDGE SIPPEL: I'm going to sustain that objection
8 to the extent that we're in a proceeding here. I want to keep
9 this on focus with respect to your summary decision as to
10 whether or not I feel it's appropriate for you to go forward
11 with a Motion for Summary Decision. If you go forward that
12 means that Scripps Howard's going to have to oppose it and I'm
13 going to have to resolve it. Now, that's all fine and good.
14 I don't mind resolving it, but if it's not an appropriate
15 issue for summary decision in my judgment, it seems to me that
16 I'm asking the parties to do a lot of things that they
17 probably maybe -- they'd be better off doing something else
18 on. I'm not prejudging the substantive merits of the issue.
19 I'm simply saying that the nature of the fact situation in the
20 Scripps -- in the Four Jacks issue in my assessment, in my
21 preliminary judgment, lends itself much more to being resolved
22 by the traditional evidence that you develop in discovery and
23 a hearing than is the situation with respect to what I'm going
24 to characterize broadly as the discovery issue with respect to
25 Scripps Howard. Now, I'm saying that in a shorthanded way

1 because I'm trying to move this question along, not because
2 I'm prejudging anything. Now, you -- I'm saying that that's
3 what my position is. I think that your footnote -- at least
4 it gives me concern. I don't think that it's appropriate for
5 you to formulate a conclusion that I have prejudged the issue.
6 No, I'm not prejudging the issue.

7 MR. LEADER: A reviewing authority is going to have
8 to decide that because you're not going to convince me that
9 you haven't prejudged the issue, especially since you won't
10 even let me or let my client demonstrate in the written
11 proceeding that the basis upon which you added the issue was a
12 misreading of fact on your part, Your Honor.

13 JUDGE SIPPEL: Well, that's a question of whether or
14 not you're --

15 MR. LEADER: And don't feel that I have to wait
16 until July to go to hearing to say, gee, I think you missed --
17 you know, you -- somebody didn't present you with the whole
18 quote here and you didn't --

19 JUDGE SIPPEL: You're asking for reconsideration.

20 MR. LEADER: I'm not -- the rule -- I read the
21 summary decision when the Commission adopted summary decision
22 in 1977. I read it this morning. It's in 24 RR.2nd And it
23 seemed that me that any issue is subject to, to summary
24 decision, and they made a distinction between reconsideration
25 and summary decision, and it seemed to me that what we're

1 asking here is summary decision. You added the, the issue for
2 whatever reason, you know, you had at the time and what was
3 before you. You know, I would like the opportunity in writing
4 and I understand that even if Scripps Howard files an
5 opposition that there's still time. The proceeding isn't
6 going to be delayed.

7 JUDGE SIPPEL: All right. I don't want to, I don't
8 want to belabor that point.

9 MR. LEADER: Well, it's going to be a very
10 significant point.

11 JUDGE SIPPEL: Well --

12 MR. LEADER: If the hearing was to begin on March
13 15th and I came in and said I want you to suspend discoveries
14 to give me the opportunity to have them comment on my motion,
15 that's one thing, but that's not the fact. The hearing isn't
16 until the middle of July.

17 JUDGE SIPPEL: Well, that's another factor for me to
18 consider, Mr. Leader. I told you what the reason -- what my
19 concern was. I don't think that your footnote fairly
20 characterizes the way that I have addressed this issue and I
21 want to get it clear. I have not prejudged the substantive
22 merits with respect to the issue added against Four Jacks. I
23 have a serious question as to whether procedurally it makes
24 sense to address that issue by way of summary decision.
25 That's it, long and short. It's a procedural call. It's got

1 nothing to do with the substantive merits of the issue. Now,
2 I'm going to ask other people to address this. By the way,
3 Scripps Howard has not opposed anything that you've said or
4 anything that you've filed thus far. This is all on my own
5 motion, so I don't want this to get into an argument between
6 you and raising things with respect to Scripps Howard. It has
7 nothing to do with your issue.

8 MR. LEADER: No. The only thing I'm raising, the
9 only thing I'm raising with Scripps Howard that has to do with
10 -- squarely with that footnote is the fairness issue.

11 JUDGE SIPPEL: All right. Well, I'll -- that's it.
12 You've said it. I hear you.

13 MR. LEADER: I've said that.

14 MR. ZAUNER: Your Honor --

15 JUDGE SIPPEL: Wait a minute. Wait just a minute.

16 REPORTER: I need just to -- could you hold just a
17 minute?

18 (Off the record.)

19 JUDGE SIPPEL: Mr. Zauner?

20 MR. ZAUNER: Yeah. I was just going to say that as
21 I read footnote 6 in your order you have not prejudged the
22 merits of the issue. All you have done is said that -- if you
23 prejudged anything, it was the request to file the motion that
24 you've prejudged. That doesn't go to the merits of the issue
25 which would have to be determined at hearing, so I don't see

1 | how there's any prejudice at all to anybody by your order, and
2 | nor do I think that you're prejudging the, the facts that will
3 | be determined at the hearing if there is a hearing on the
4 | issue. But I would also just like to comment on the right of
5 | Four Jacks to file a Motion for Summary Decision.

6 | JUDGE SIPPEL: Yes. I'd like to hear that.

7 | MR. ZAUNER: As I read Section 1.251, (a)(1) says,
8 | "Any party may move for summary decision of all or any of the
9 | issues in the proceeding." It gives them an open right to do
10 | so. Then along comes Section 1.251(f) which you've quoted
11 | which appears to give you the authority, the discretionary
12 | authority, to permit or not permit a Motion for Summary
13 | Decision to be filed. I think, though, that that Section (f)
14 | has to be read in its entirety and that what the Commission's
15 | really focusing on there is preventing the filing of a Motion
16 | for Summary Decision where the results would be unwarranted
17 | delay in the proceeding and I think that Four Jacks does have
18 | the right to file a Motion for Summary Decision and if, in
19 | fact, Four Jacks is correct and they can show that there were
20 | errors made in the addition of the issue or that facts were
21 | not considered that should have been, or whatever it is that
22 | they come up with, and if they're correct it may end up saving
23 | the Commission and yourself and the parties to this proceeding
24 | a substantial amount of time. It doesn't make sense to try an
25 | issue that, that could be determine by summary decision in

1 advance.

2 JUDGE SIPPEL: Okay.

3 MR. HOWARD: Your Honor, what they say has, has some
4 merit to it but, on the other hand, I think it's plainly
5 obvious that this issue cannot be decided on a Motion for
6 Summary Decision. The merits of the -- they've made --
7 they've -- themselves and made plainly inconsistent
8 representations to the FCC as compared to the SEC and that's
9 got to be explored in a evidentiary hearing. There is -- I
10 think that the notification that they filed is, in fact, an
11 improper and prejudicial document which raises allegations
12 without any hint of what it is that they're talking about.
13 They accuse Scripps Howard of serious omissions and persuading
14 statements in the pleadings without giving any clue as to what
15 they're talking about with respect to that, that allegation.
16 I don't think that that sort of pleading advances the -- any
17 issue in this case and I don't think it should be condoned.
18 So the sum of the matter is that the subset -- Subsection (f)
19 grants the presiding judge the authority to look at the issue,
20 look at the nature of the issue, and decide whether summary
21 decision could possibly be applicable in that case, and I
22 think that the facts here clearly indicate that it could not
23 adequately resolve the issue, certainly not in their favor.

24 MR. ZAUNER: The problem with Mr. Howard's argument
25 is we don't know until we see the Motion for Summary Decision

1 whether or not the issues can be resolved by summary decision.
2 We haven't seen the documents yet. We just don't know. We're
3 guessing or speculating. I don't know yet what it is that
4 Four Jacks has to present that -- in support of a Motion for
5 Summary Decision. Until that -- until I see that, I can't
6 make that determination.

7 MR. HOWARD: And whose fault is it that we don't
8 know? It's Four Jacks that didn't provide us with the
9 information in this notification.

10 MR. LEADER: We were only required to file
11 notification on a date and that's all we filed.

12 MR. HOWARD: You did --

13 MR. LEADER: If we filed more, we'd be in here
14 arguing about why we went beyond the scope of what the judge
15 ordered.

16 MR. HOWARD: Well, you did go beyond it. I'm sorry.

17 JUDGE SIPPEL: I can understand what your position
18 is, Mr. Howard. No, I -- I mean, I want to make that clear,
19 too, Mr. Leader, that I did -- in my order I did state that --
20 as I had stated at the conference, that the -- that there was
21 a date certain on which you had to file a notification.
22 However, upon reflection, after that conference I, I indicate
23 -- I became concerned about the utility of summary decision on
24 that issue and I flagged that in my footnote because I didn't
25 want you thinking that I was inviting that motion and I didn't

1 want unnecessary work to be turned to that project if it --
2 while there's some doubt in my mind as to whether or not it's
3 appropriate. I -- unfortunately every time we get into one of
4 these discussions, and I'm not sure whether a conference
5 really should be called for discussion purposes, there seems
6 to be accusations that go against -- that flow across the
7 table with respect to good faith in terms of allegations and
8 pleadings, and I just want that to stop. These issues are --
9 to me they're clear issues and I have not seen anything yet in
10 the nature of -- well, I'm not going to commit myself to what
11 I have or haven't seen because I haven't gotten that deep into
12 all the papers yet. But I'm -- I am reluctantly going to
13 authorize the filing of a Motion for Summary Decision
14 primarily because of what you have outlined, Mr. Leader, that
15 time is not of the essence in this case. There is time to
16 address it. As I said, you know what my, you know what my
17 predisposition is insofar as I have expressed it with respect
18 to that being an appropriate medium, procedural medium, for
19 addressing that issue. You understand that? I'm not
20 prejudging the substantive merits of the issue in any way,
21 shape or form. All right. And I'm also -- I've listened very
22 carefully to the Bureau's position with respect to 1.251. I
23 think my -- I do think that my authority goes beyond that. I
24 think that I also have authority under 1.242 to regulate the
25 course of these proceedings and I think that I can, I can -- I

1 do -- I could have ordered Scripps Howard or I could have
2 refused to rule on Scripps Howard's Motion for Summary
3 Decision if I thought it hadn't been filed appropriate,
4 notwithstanding the 20 day. It was well in advance of 20 days
5 before the hearing. That's my call. But, as I say, I've
6 listened to what the Bureau has to say. I'm impressed with
7 what the Bureau's argument is. I'm impressed with your
8 argument with respect to the timeliness and I think under this
9 argument of fairness that it would be appropriate to permit
10 you to go forward as you see fit on that motion. With respect
11 to what it's going to do to the proceeding, I think -- this
12 is, this is just purely -- on my part because you're certainly
13 giving the other side an opportunity to see more of your case
14 up front than they otherwise might be seeing, but that's --
15 you know, they say that's just an observation on my part.
16 That doesn't go to the merits of my ruling. So I am, I am
17 going to authorize -- you may not feel that you need my
18 authorization but, in any event, I am going to authorize --

19 MR. LEADER: I'm happy to have it.

20 JUDGE SIPPEL: I am going to authorize the filing on
21 the 28th of February, as you've indicated in your
22 notification. I'm going to require that it be done by hand
23 delivery and then that gives Scripps Howard an even 14 days to
24 file an opposition. There will be no replies. And the
25 Bureau, it's up to you, Mr. Zauner, as to whether or not you

1 want to participate in it or not.

2 MR. ZAUNER: I'm sure we'll file comments.

3 JUDGE SIPPEL: All right. Do you want a day -- do
4 you want to do the comments the day after the opposition comes
5 in or do you want to do it the same --

6 MR. ZAUNER: No, I'll do it the same time the
7 opposition.

8 JUDGE SIPPEL: All right. Then that will be on the
9 14th. Now, Mr. Zauner doesn't have all the capabilities of
10 running around here and carrying things, so if he notifies you
11 that he's got something you could send somebody over and pick
12 it up from him. That's all I have. Again, we're in recess
13 until July 12th. Thank you.

14 (Whereupon, the conference was adjourned at 9:50
15 a.m.).

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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

IN THE MATTER OF SCRIPPS HOWARD BROADCASTING COMPANY
Name AND FOUR JACKS BROADCASTING, INC.

MM DOCKET NO. 93-94
Docket No.

WASHINGTON, D.C.
Place

FEBRUARY 24, 1994
Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1414 through 1429, inclusive, are the true, accurate and complete transcript prepared from the reporting by ALICE WEHNER in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

March 3, 1994
Date

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